

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States  
Department of Housing and Urban  
Development, on behalf of  
Sharon Bartley,

Charging Party,

v.

HUDALJ 02-93-0173-1  
Decided: September 9, 1994

Margaret Medige and Jack Coyne,

Respondents.

Elizabeth F. Buckley, Esquire  
For the Respondent

William R. Hites, Esquire  
For the Respondent

Sharon Cherry, Esquire  
For the Government

Before: Thomas C. Heinz  
Administrative Law Judge

**INITIAL DECISION**

**Statement of the Case**

This proceeding arises out of a complaint filed by Sharon Bartley ("Complainant") alleging that Margaret Medige and Jack Coyne ("Respondents") violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (sometimes "the Act"), by denying and refusing to negotiate the rental of a dwelling, and by discriminating in the terms, conditions, or privileges of rental of a dwelling based on Complainant's race (Black). The Department of Housing and Urban Development ("HUD" or "the Secretary") investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a Charge of Discrimination against the Respondents on

February 10, 1994. The Charge alleged that Respondents have violated §§ 804(a) and (b) of the Act (42 U.S.C. §§ (a) and (b)), as well as §§ 100.50, 100.60, and 100.65 of the regulations promulgated thereunder (24 C.F.R. §§ 100.50, 100.60, and 100.65).

After an Answer to the Charge was filed, an oral hearing was held on May 17 and 18, 1994, in Buffalo, New York. Thereafter, the parties were ordered to file proposed findings of fact, conclusions of law, and briefs in support thereof. The last brief was received on August 1, 1994.

#### **Findings of Fact**

Complainant Sharon Bartley is a Black woman who in November 1992 applied to rent the lower of two apartments located at 288 Windermere Avenue, Amherst, New York. (Stip. 1)<sup>1</sup>

Respondents, Dr. John F. Coyne and Margaret Medige, husband and wife, own the duplex apartments at 288 Windermere Avenue, Amherst, New York. (Stip. 2) Respondents purchased the property in 1987 and resided there until October 1991. (Stip. 3)

The Respondents own no rental housing other than the duplex at 288 Windermere. Dr. Coyne is a pediatrician specializing in the care of sexually abused children. (TR. 326-27) He is the director and a founder of a medical center for inner-city children from low-income, mostly Black, families in Niagara Falls, New York. (TR. 325, 328) Dr. Coyne has also been an ordained priest since 1971, first in the Roman Catholic rite and later the Greek Orthodox. (TR. 329, 333) Ms. Medige is a full-time homemaker who cares for their two young sons. (TR. 271)

Since June of 1988, Respondents have leased the upper unit at 288 Windermere to People, Inc., a not-for-profit agency dedicated to serving the needs of developmentally disabled people, including the mentally disabled. (Stip. 4; TR. 257, 258; RX. A) During that time, the apartment has been occupied by clients of People, Inc. (TR. 259-60, 336) Under the terms of their lease with People, Inc., Respondents have no power to influence tenant selection for the upper apartment. (TR. 257,

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<sup>1</sup>The following reference abbreviations are used in this decision: "Stip." for "Stipulation by the parties"; "TR." for "Transcript"; "SX." for "Secretary's exhibit"; and "RX." for "Respondents' exhibit."

259-60; RX. A) Since Respondents moved from the lower apartment in 1991, it has been occupied by a succession of tenants, three of whom were White and one (the current tenant) Black. (TR. 276-77)

The first of Respondents' tenants to occupy the lower unit vacated it suddenly in November 1992. Respondents then advertised it in a local newspaper from Saturday, November 21, 1992, through Friday, November 27, 1992. (Stip. 5; RX. B, C) Respondents gave their home telephone number as the contact number in the ad. Because Respondent Medige was home most of the day, she answered most of the calls responding to the ad and maintained a log of the calls in the order in which they were received. (TR. 280-82, 307, 339; RX. D)

Before receiving any responses to their ad, Respondents had decided that they would show the apartment to all interested parties before choosing the successful tenant. (TR. 74, 223, 226-27, 285-86, 293, 353, 356, 358, 361-62; Stip. 12, 13)

At the time Respondents placed the ad in the newspaper, they did not plan to show the apartment until it had been thoroughly cleaned, which they thought would be accomplished before Saturday, November 28, 1992. However, they were unable to clean the apartment as planned because the previous tenant had changed the locks on the apartment and moved without leaving a key. (TR. 281-82, 346, 353)

Complainant telephoned in response to the ad on Wednesday, November 25, 1992, and spoke to Respondent Medige. (Stip. 6) She was the eighth person to inquire about the apartment, but at her request she was given the first appointment for Saturday, the 28th. (TR. 11, 283, 287; RX. D; Stip. 7) Respondent Medige promised Complainant that she would be the first person to see the apartment. (TR. 285-86)

Late in the afternoon on Friday, November 27, 1992, Mr. Larry Brown telephoned Respondents' home to inquire about the apartment and spoke to Respondent Coyne, who was home alone. At this juncture the apartment had yet to be prepared for viewing. In ignorance of his wife's promise to Complainant that she would be the first to see the apartment, and despite the fact that he and his wife had decided not to show the property until it had been cleaned, Respondent Coyne agreed to show the place to Mr. Brown and his wife Pamela that same day, because Mr. Brown

said that they were from out of town, that they would be leaving town the next day, and that they did not care that the apartment was dirty. (TR. 217-20, 248, 341-43, 354-55, 386-89)

Within a few minutes of speaking with Mr. Brown on the telephone, Respondent Coyne met him and his wife at the apartment. After only a cursory inspection, the Browns said that they wanted to rent it. They were very enthusiastic about the place and made no negative comments about it. They said that they would be pleased to assist the upstairs tenants from People, Inc., with minor problems should any arise, and made unsolicited offers to perform a variety of maintenance tasks on the property. Mr. Brown offered to snowblow where necessary, mow the lawn, change the locks, as well as act as an unpaid resident handyman for minor repairs. (TR. 224-27, 233, 237-40, 294, 343, 345, 348-50, 352, 354)

Respondent Coyne declined the Browns' offer to rent at that time because he and his wife had previously decided to choose the successful tenant only after the apartment had been shown to everyone who was interested. The Browns then insisted that Respondent Coyne accept a check for the deposit in case they should be chosen as the successful tenants, because they were leaving town the next day. They instructed him to tear up the check if he chose someone else. (TR. 226-228, 245-46, 353-6; RX. 1) That evening Respondents discussed the Browns' offer, found it attractive, but confirmed their

resolution to show the apartment to everyone with appointments before making a choice. (TR. 314-15, 356)

On Saturday morning, Respondent Coyne was at the apartment to greet Complainant and her cousin, Mrs. Pamela Johnson, when they arrived as scheduled. By this time, he had learned that by showing the apartment to the Browns he had unknowingly acted contrary to his wife's promise to Complainant that she would be the first person to see the apartment. With this thought in mind, he told Complainant, shortly after he began showing the apartment to her and her cousin, that he had shown the apartment the night before to people from whom he had accepted a check, but that the successful tenant would not be chosen until after everyone who had made appointments had seen it. Complainant and her cousin then asked if they could wait for Respondent Medige, to which Respondent Coyne assented. While waiting for

Respondent Medige to arrive, Complainant and her cousin brought to Respondent Coyne's attention several flaws in the apartment, including holes in the walls and the need to repaint. (TR. 67, 162-63, 177-79, 357-60)

When Respondent Medige arrived, Complainant received a tour of the rest of the premises. Upon completion of the tour, Complainant offered to rent the apartment "as is" and offered to give Respondents a deposit check. Respondent Coyne refused to accept a deposit check from Complainant, explaining that he had made an exception to his rule not to take deposit checks from prospective tenants for the Browns only because they were going out of town. Respondent Coyne reiterated his determination to choose the successful tenant only after all of the prospective tenants had been interviewed. (TR. 295, 360-66; SX. 1)

Several more people came to see the apartment on Saturday and Sunday. Everyone who saw it wanted it. On Sunday evening, Respondent Coyne, who had primary responsibility for making decisions concerning the rental property, chose Larry and Pamela Brown, who are White, as the successful tenants. Respondent Medige acquiesced in the choice and notified all of the interested parties of the decision by telephone on Monday. (Stip. 11; TR. 296, 298, 367-68)

Respondents came to their decision without any formal tenant selection procedures, policies, or guidelines. They had no tenant application forms, did not ask for credit, job, or landlord references, and did not solicit deposit checks from any prospective tenant. (Stip. 12, 13; TR. 297, 368)

Before Respondents chose the Browns as the successful tenants in November 1992, they had been responsible for snow removal pursuant to the terms of the lease. The lease did not require tenants to perform any specific maintenance of the apartment. Because the Browns had volunteered to snowblow and mow the lawn, those tasks were incorporated into their lease as the obligations of the tenant. Subsequent tenants have been required to remove snow as necessary and maintain the lawn. (TR. 315, 350, 378-79, 399-400, 402-04; RX. G, J)

Respondent Coyne offered the apartment to Complainant after the Browns vacated it. (TR. 375-76)

Subsidiary Findings andDiscussionLegal Framework

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982). See also *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.) *cert. denied*, 419 U.S. 1027 (1974).

The Act makes it unlawful for anyone to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race...." 42 U.S.C. § 3604(a). Furthermore, the Act prohibits a housing provider from "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race...." 42 U.S.C. § 3604(b).

Special methods have been devised to analyze the proof adduced in cases alleging violations of civil rights. The framework to be applied in a case under the Fair Housing Act depends on whether the evidence offered to prove the alleged violation is direct or indirect. Direct evidence, if it constitutes a preponderance of the evidence as a whole, will support a finding of discrimination. See *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir.) *cert. denied*, 498 U.S. 983 (1990). However, in the absence of direct evidence of discrimination, the analytical framework to be applied in a fair housing case is the same as the three-part test used in employment discrimination cases under Title VII of the Civil Rights Act as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *HUD v. Blackwell*, 908 F.2d 864, 870 (11th

Cir. 1990); *Pinchback*, 907 F.2d at 1451. Under that test:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence ... Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action ... Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance [of the evidence] that the legitimate reasons asserted by the defendant are in fact mere pretext.

*Pollitt v. Bramel*, 669 F.Supp. 172, 175 (S.D. Ohio 1987); see also *McDonnell Douglas*, 411 U.S. at 802, 804. The shifting burdens analysis in *McDonnell Douglas* is designed to ensure that a complainant has his or her day in court despite the absence of any direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, (1984) (citing *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)).

#### Prima Facie Case Established

The record in the instant case contains no direct evidence showing that Respondents discriminated against Complainant because of her race. The record does, however, contain indirect evidence sufficient to establish the four elements of a prima facie case of unlawful discrimination: (1) As a Black woman, Complainant is a member of a protected class under the Act; (2) she appears to have been qualified to enter into a contract to rent Respondents' apartment; (3) she attempted to do so when the apartment was available but was rejected; and (4) the apartment was rented to someone else.<sup>2</sup> See *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979); *Soules v. HUD*, 967

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<sup>2</sup>The last element of the prima facie case is usually formulated: "The dwelling thereafter remained available for rent." However, the elements of a prima facie case "are not fixed"; they may vary depending on the circumstances. *Pinchback v. Armistead Homes Corp.*, 689 F. Supp. 541, 549 (D. Md. 1988), *aff'd*, 907 F.2d 1447 (4th Cir.) cert. denied, 498 U.S. 983 (1990). In this case, Respondents evaluated all of the prospective tenants at one sitting rather than in the order in which they applied. For purposes of prima facie case analysis, the essential point is that Complainant was not the successful applicant even though she applied to rent the apartment at a time when it was available.

F.2d 817, 822 (2d Cir. 1992). The burden therefore shifts to Respondents to articulate a legitimate, nondiscriminatory reason for their rejection of Complainant. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981); *Blackwell*, 908 F.2d at 871.

Respondents' Explanations for their Conduct

Respondents deny that racial considerations played any part in their rejection of Complainant. In the words of counsel for Respondents:

The Browns became the successful tenants because: (1) they did not bring any flaws in the apartment to Dr. Coyne's attention; (2) they expressed excitement and enthusiasm for the apartment; (3) they were very forthcoming regarding their desperate need for housing and their desire to rent in this particular neighborhood because it was so close to Mrs. Brown's sister's house; [and] (4) they voluntarily assumed numerous maintenance chores, including changing the locks, maintenance of the radiator heat system, as well as yard work and snowplowing.

(Brief, pp. 29-30) Complainant, in contrast, brought several flaws in the apartment to Respondent Coyne's attention, was "not excited about the apartment like the Browns were," and did not volunteer to perform the maintenance chores that the Browns offered to do. (TR. 370-72) The Charging Party argues that Respondents' proffered reasons for choosing the Browns over Complainant are merely pretexts for racial discrimination. The preponderance of the evidence does not support that argument.

Of the several justifications Respondents cite to explain their choice of the Browns as the successful tenants, the most significant is the Browns' unsolicited offer to perform various maintenance chores previously done by Respondents. The Charging Party argues that this justification is plainly a pretext for racial discrimination, citing Complainant's assumption that she would be responsible for snow removal and lawn maintenance, Respondents' favorable discussion of the Browns' offer on Friday evening, the failure of Respondents to inform Complainant of the Browns' offer to perform chores and to ask her if she would match it, and the inclusion of those maintenance chores in the Browns' lease. The thrust of this argument is that Complainant

was not afforded an opportunity to rent the apartment on the same terms and conditions as the Browns, in violation of section 804(b) of the Act. That argument has no merit.

Complainant's unexpressed assumption that she would be responsible for snow removal and lawn maintenance is not equivalent to Respondents' explicit offer to perform those tasks. Furthermore, it does not follow from the Respondents' favorable discussion of the Browns' offer on Friday evening that the terms of that offer thereafter became conditions of the Respondents' offer to rent for everyone. Nor does it follow from the inclusion of those terms in the Browns' lease that those terms had been a condition of rent for all prospective tenants from the beginning of the interview process. Snow removal and lawn maintenance did not become conditions of the rental until *after* everyone had been interviewed, because Respondents did not accept the Browns' offer until Sunday evening. Moreover, according to the Charging Party's argument, if a prospective tenant competing with others to rent an apartment makes a counteroffer superior to the landlord's original rental offer, the landlord is obligated to contact all prospective tenants and give them the opportunity to match the superior counteroffer. Landlords have no such duty, and the failure to perform a nonexistent duty cannot be said to manifest racial discrimination.

The remaining reasons cited by Respondents to justify their choice of the Browns are almost entirely based on Respondent Coyne's subjective perceptions of relatively greater "excitement," "enthusiasm," "desperation" for housing, and positive attitude displayed by the Browns. Landlords may, in some circumstances, use subjective criteria to choose among prospective tenants. *Soules*, 967 F.2d at 822; *Frazier v. Rominger*, 27 F.3d 828, 822-23 (2d Cir. 1994). In *Frazier*, a landlord was accused by a potential tenant of racial discrimination while the landlord was interviewing him. The accusation of racial bias upset the landlord, who on that basis alone rejected the plaintiff and his companion as potential tenants. At the subsequent trial, the landlord successfully proffered his subjective feelings to rebut the plaintiff's prima facie case. On appeal the Circuit Court stated:

Mr. Rominger offered a subjective explanation why he rejected Mr. Frazier and Ms. Treloar. Courts frequently permit such subjective explanations to

be considered by the fact-finder. See *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 823 (2d Cir. 1992) (tenant rejected not because of familial status but because of her "negative and combative attitude"); *Washington v. Sherwin Real Estate, Inc.*, 964 F.2d 1089, 1090 (7th Cir. 1982) (tenant rejected not because of race but because of his "rude and belligerent behavior in the real estate office"). To be sure, subjective explanations such as these should be examined very closely. See *Soules*, 967 F.2d at 822; *Washington*, 694 F.2d at 1089-90.

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In some cases, it may be expected that these subjective justifications will be a sham, camouflaging nothing more than an animus towards minority applicants. But in others, the proffered justification will accurately reflect the defendant's real motivation.

27 F.3d 832; See also *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039-40 (2d Cir. 1979).

The Charging Party contends that, like the Browns, Complainant was very excited and enthusiastic about renting the apartment. Objectively viewed, Complainant may indeed have been just as excited and enthusiastic about the apartment as the Browns, but that is not how Respondent Coyne interpreted her demeanor and conduct, and the record does not demonstrate that his subjective justifications for rejecting Complainant are a sham designed to camouflage racial discrimination.

#### Complainant Had Cause to Suspect Discriminatory Treatment

This case probably would not have arisen but for two circumstances: (1) Complainant was not the first person to see the apartment even though Respondent Medige had promised her she would be, and (2) Respondent Coyne would not accept a deposit check from Complainant even though he told her he had accepted one from the Browns. These circumstances understandably made Complainant suspicious that she was not being fairly considered as a prospective tenant. However, the record shows that these circumstances were caused not by racial animus on the part of the Respondents, but rather by misunderstanding and

miscommunication on the part of both Respondents and Complainant, compounded by Respondent Coyne's attempt to mend his wife's broken promise with a confession and his failure to appreciate the impact of treating prospective tenants differently.

Complainant was under the impression that if she saw the apartment first and liked it, she could rent it. (TR. 55; SX. 1) In other words, she thought Respondents were offering the apartment on a "first come, first served" basis. Complainant misunderstood Respondents' offer; they in fact had decided to select a tenant only after everyone who wanted to see the apartment had done so. Respondent Medige credibly testified that although she promised that Complainant would be the first to see the apartment, she did not promise that Complainant could have the apartment if she liked it. Respondent Medige's testimony is supported by the telephone log she maintained to schedule interviews with prospective tenants. The log shows that when Complainant first spoke with Respondent Medige on the telephone, several people had already made appointments to see the apartment. It would not have made sense in those circumstances to promise Complainant that she could have the apartment if she liked it. It *would* have made sense, however, to tell Complainant when she insisted on having the first appointment that she would gain no advantage over her competition by seeing the apartment first--a caveat that would have precluded Complainant's misunderstanding.

Furthermore, Respondent Coyne might not have broken his wife's promise if he had known she had made it. Instead, he did not learn of the promise until after he had broken it. Had husband and wife been in closer communication about arrangements to show the apartment, Complainant presumably would have been first to view it, as promised, and the circumstances that caused her to suspect she was being treated unfairly would not have occurred.

Complainant's suspicions stemmed, in large part, from Respondent Coyne's gratuitous confession that he had already shown the apartment to another prospective tenant from whom he had accepted a check:<sup>3</sup>

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<sup>3</sup>If Respondent Coyne had not told Complainant that he had shown the apartment to the Browns on Friday night and accepted a check from them, Complainant would never have known that she was not the first to see the

We were walking into the living room and then we had a discussion about, I forget how this happened. I believe I brought it up first. As I was showing them the front room, I told them that, because I knew that Maggie [Respondent Medige] had told them they'd be the first ones to see the apartment, so I told them that I did show the apartment last night.

I was a little uncomfortable with that because I knew Maggie had told them they'd be the first, and I didn't know that I had made this exception. And I felt uncomfortable that I did that to them. So I told them that I had, and that those people liked it very much. They had given me a check but it was not a security deposit essentially. It wasn't, they did not rent the apartment yet. I still had to show it to you and to many others.

(TR. 358) But Respondent Coyne failed to appreciate that his candid confession could be interpreted as an attempt to discourage Complainant from offering to rent the apartment. He also failed to understand that his refusal to accept Complainant's proffered deposit check could generate suspicion that he was motivated by racial animus. If he had accepted her check, no charge of disparate treatment regarding the checks could be made, because he would have treated Complainant just like the Browns. However, at this point in the analysis, disparate treatment, standing alone, will not suffice to demonstrate racial bias. The Charging Party must prove, by a preponderance of the evidence, that the disparate treatment was motivated by racial animus.

#### Record Does Not Establish Racial Animus

Respondent Coyne testified that he refused Complainant's check and told her that he had made an exception to his rule not to take deposit checks from prospective tenants for the Browns only because they were going out of town. Mrs. Brown confirmed that she and her husband had insisted Respondent Coyne accept a check because they were leaving the area and did not want the

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apartment.

rental process to be influenced by mail delays.<sup>4</sup> (TR. 226-27) Although Respondent Coyne could have made another exception to his rule and taken Complainant's check without suffering any compromise to his decisional freedom, he chose not to do so. Since he could have taken Complainant's check at little or no inconvenience to himself, his choice is somewhat open to question, particularly considering that Complainant alerted him at the time that she thought she was being treated unfairly. Nevertheless, Respondent Coyne's explanation for his conduct is not implausible on its face, and close scrutiny of his handling of the deposit check issue reveals no hidden racial animus.

The Charging Party also argues that Complainant did not receive the same kind of tour of the apartment as the Browns. There are indeed inconsistencies and contradictions in the record as to who said and did what, when, and in what order. But given the lapse of time between the events in question and the trial, it is understandable that the parties would not recall the details of their experiences with complete clarity and precision. These inconsistencies and contradictions do not appear to manifest bad faith on either side. I am satisfied that Respondents' version of the events is more coherent, more internally consistent, and more plausible than Complainant's, and that Complainant and the Browns received essentially equivalent tours of the property.

Complainant's cousin, Mrs. Pamela Johnson, testified that when she and Complainant first met Respondent Coyne she noticed a look of "shock" on his face, which she interpreted as surprise that they were Black. (TR. 162, 186) The probative value of Mrs. Johnson's subjective and uncorroborated interpretation of an inherently ambiguous facial expression becomes negligible in light of Respondent Coyne's credible testimony that before Complainant arrived at the apartment he and his wife had speculated that she might be Black. (TR. 369) Respondent Medige

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<sup>4</sup>The Charging Party complains that Mrs. Brown was not a credible witness, citing several apparent inconsistencies and contradictions in her testimony. While her testimony in general was not a model of precision, she convincingly corroborated Respondent Coyne's testimony to the effect that he accepted the Browns' deposit check reluctantly and with the clear understanding that he was free to choose someone else to rent the apartment. As for the remainder of her testimony, she either corroborated the testimony of Respondent Coyne or she created inconsistencies that could be explained as memory lapses or sloppy use of language. She appeared to be a disinterested witness attempting to recall events as best she could.

had reported to him that she thought Complainant was Black based on her accent on the telephone. (TR. 310) The Charging Party asks that I take judicial notice that Complainant did not have a discernible accent when she testified at hearing. Although to my ear Complainant had no discernible accent, I cannot say that someone with an ear more sensitive than mine--or Respondent Medige--could not have detected an accent. Judicial notice may be taken only of matters not open to reasonable dispute. Accordingly, whether or not Complainant has an accent that identifies her as Black is not a proper subject for judicial notice.

In any event, that Respondent Coyne thought Complainant might be Black before meeting her tends to show that he harbors no secret racial animus. If he did not want a Black person to live in the apartment, he could have accepted the Browns' offer to rent on Friday evening and then called and canceled Complainant's Saturday appointment on the ground that the apartment had been rented. In fact, both Respondents testified that they thought it would be a "good thing" to rent to a Black family. (TR. 310, 369) That Respondents discussed Complainant's race before meeting her cannot be taken to manifest discriminatory animus, the Charging Party's argument to the contrary notwithstanding. If endorsed, that argument would undermine all affirmative action by landlords attempting to preclude housing discrimination. Landlord discussions about the race of prospective tenants cannot be deemed inherently prejudicial.

Respondents turned their belief that it would be a good thing to rent to a Black family into reality when they rented the apartment to its current occupant, who is Black. To be sure, they rented to the current occupant after receiving notice that Complainant had charged them with housing discrimination. It is therefore possible that they rented to a Black tenant simply to create exculpatory trial evidence. But there is nothing in the record to prove that the transaction was merely a cynical ploy designed to camouflage racial prejudice. The same can be said of Respondent Coyne's offer of the apartment to Complainant after the Browns vacated it.

Respondents' lease with People, Inc., comports with Respondents' claim that they did not discriminate against Complainant based on her race. According to the terms of the

lease, the corporation has exclusive responsibility for determining who resides in the upstairs apartment at 288 Windermere. People, Inc., is governed by New York Mental Hygiene Laws, which prohibit discrimination on the basis of race. (New York State Mental Hygiene Law § 1307(c) and implementing regulation, 14 NYCRR § 686.6(g)) If Respondents had wanted to ensure that Black people did not live in their upstairs apartment, they would not have given People, Inc., total control of tenant selection. The Charging Party's objections to the admissibility of the evidence concerning People, Inc., have no merit. That evidence is admissible under FRE 404(b) because it tends to show that Respondents have no intent to exclude Black people from their housing. It is immaterial that People, Inc., had not placed a Black tenant in the upstairs apartment as of the date of the hearing.

#### Conclusion and Order

Respondents are not professional landlords. At the time this case arose they had very little experience in the rental housing business. They had no formal tenant selection procedures, policies, or guidelines, did not use tenant application forms, and did not ask prospective tenants for credit, job, or landlord references. Their inexperience created circumstances that understandably made Complainant suspect she was being treated unfairly. However, a careful review of the record has not revealed sufficient evidence to conclude that Respondents rejected Complainant as a tenant for their apartment because of her race. In other words, the Charging Party has failed to prove by a preponderance of the evidence that Respondents have engaged in a discriminatory housing practice in violation of the Act. Accordingly, the Charge of Discrimination is hereby ORDERED dismissed.

/s/

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THOMAS C. HEINZ  
Administrative Law Judge

Dated: September 9, 1994.

